

APPEAL NO. 93352

A contested case hearing was held on March 29, 1993, in (city), Texas, before hearing officer. The case was heard under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). The two issues before the hearing officer were as follows: whether the appellant (hereinafter claimant) has received post-injury wages from employment which should be used in the calculation of his temporary income benefits (TIBS), and whether the claimant has disability as the result of his August 23, 1991 compensable injury. The claimant appeals the hearing officer's determination that effective September 13, 1991--the date on which he was incarcerated--he no longer had disability as defined by the 1989 Act, Article 8308-1.03(16). The respondent, hereinafter carrier, basically argues that the hearing officer's decision is supported by prior decisions of this panel and should be affirmed.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was not present at the hearing, was employed as a welder by (employer) on August 23, 1991, when he injured his neck and back. On September 13, 1991, the claimant was incarcerated in the state penitentiary, under a 40-year sentence, and was still incarcerated at the time of the hearing. According to counsel for the carrier, the claimant received TIBS until February 19, 1993.

Medical evidence in the record shows that the claimant was seen by (Dr. J) on August 29, 1991. At that time Dr. J's assessment was lumbar and cervical syndromes, with possible cervical radiculopathy, and he recommended a CT scan which showed evidence of disc herniations at C4-5, C5-6, and C6-7. Dr. J did not treat claimant further after September of 1991. On June 16, 1992, he wrote the carrier that he was unable to comment on claimant's medical status at that time and therefore did not consider it appropriate to give the claimant an impairment rating; however, he also wrote that he would "estimate 15 percent impairment as the result of cervical disc disruption at three levels with limited range of motion and intermittent radicular symptoms."

Claimant also received medical treatment while incarcerated. An October 28, 1992 MRI of the cervical spine disclosed a small herniated nucleus pulposus (HNP) at C5-6, a small central HNP at C6-7, and posterior osteophytes at C4-5. He was prescribed pain medication and placed on restrictions, including no standing more than four hours without rest and no lifting more than 50 pounds. A December 2, 1992 letter from (Dr. H) of the Texas Department of Criminal Justice said the claimant had been placed on "fairly strenuous restriction for degenerative disease of the cervical spine." She also noted the results of claimant's MRI and said his referral neurosurgeon determined on November 18, 1992 that the claimant had no surgical lesion in the cervical spine. Dr. H further stated that the neurosurgeon had prescribed anti-inflammatory agents and muscle relaxants as needed, with no further follow-up planned.

Other medical records from the Department of Criminal Justice show that the claimant has been treated for other ailments, including hepatitis and stomach problems.

A March 22, 1993 letter from the claimant stated that since being incarcerated he has been assigned to the maintenance department with working restrictions, but that even with the restrictions he has been unable to perform his duties and that he misses about 15 days of work a month due to his injury. He contended that his disability has continued and that he has no control over his job assignment. The claimant's wife testified at the hearing that claimant has told her there were weeks in which he could work only one or two days. She also said the claimant was not being paid for his work.

The hearing officer, citing Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993, noted that the appeals panel in that case had upheld the hearing officer's determination that the incarceration, and not the compensable injury, was the reason for that claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage, as provided by Article 8308-4.23. On appeal, the claimant contends that the hearing officer's determination that the claimant's rights to benefits ceased solely because of incarceration is in conflict with the 1989 Act and rules of the Texas Workers' Compensation Commission.

Appeal No. 92674, *supra*, involved a factual situation similar to the one in this case. There, the claimant injured his leg in a work-related incident some seven months before his incarceration. He continued to suffer physical effects from his injury and every two to three weeks saw prison doctors, who had prescribed him medication; he also worked at the prison, under lifting and standing restrictions, was not paid for his work, and said he had to work because otherwise he would be classified as a security threat.

The hearing officer in that case held that the claimant had disability which continued until his incarceration, at which time disability ceased. The Appeals Panel, after reviewing the case law of other jurisdictions, pointed out that the issue must be decided under the 1989 Act's definition of disability and not under the prior law's concept (and that of other states' laws) of incapacity. That decision further stated:

TIBS are to replace lost wages due to a compensable injury. In this case, actual loss of wages became directly attributable to the claimant's incarceration since he cannot earn wages while incarcerated. In our opinion, incarceration, and not the compensable injury, has become the reason for the claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage.

The hearing officer is the sole judge of the relevance and materiality of the

evidence and of its weight and credibility. Article 8308-6.34(e). As in Appeal No. 92674, we find sufficient evidence to support the hearing officer's determination, following receipt of all the evidence, that the claimant no longer had disability effective September 13, 1991. We note with approval that the hearing officer's decision provides that the claimant remains eligible for medical benefits reasonably required by his compensable injury, and that he remains ineligible for TIBS until he is able to show that he has disability as defined by the 1989 Act.

The provisions of Article 8308-1.021, raised by claimant in his appeal, do not change the foregoing result. That section, which states that nothing in the act shall be applied to discriminate because of race, sex, national origin, or religion, but that it does not prohibit consideration of anatomical differences in application of impairment guidelines, is inapplicable to the issue in this case.

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge